Office-Supreme Court, U.S.
FILED
Feb 15
1983
ALEXANDER L. STEVAS,
CLERK

82-1593
No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WARDEN, MARYLAND PENITENTIARY,
Petitioner,

v.

ROLAND ANDERSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in concluding that the trial judge's remarks to the jury as to alibi witnesses who recanted their admittedly perjurous testimony were not harmless, despite the overwhelming evidence of Anderson's guilt and the fact that the defense did not meet all the evidence presented by the State?

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WARDEN, MARYLAND PENITENTIARY,

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit, Roland Anderson v. Warden, Maryland Penitentiary, Nos. 81-6626 and 82-6627, is reported at 670 F.2d 1339 (4th Cir. 1982). A copy of that opinion is reproduced in Appendix hereto as Exhibit A. The decision of the United States Court of Appeals for the Fourth Circuit in

Anderson v. Warden, Maryland Penitentiary, rehearing en banc, is reproduced in the Appendix hereto as Exhibit B.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit, on February 9, 1982, reversed the District Court. After granting a petition for rehearing and rehearing en banc, on May 11, 1982, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's granting of the petition for writ of habeas corpus on December 15, 1982. This Petition is filed within 60 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Proceedings Below

On October 29, 1970, Anderson was convicted by a jury in the Circuit Court for Calvert County (Bowen, J.) of felony murder, rape, and burglary. Anderson was sentenced to two concurrent life sentences plus, for the burglary conviction, a concurrent 20-year term.

By its Order of July 10, 1974, the Circuit Court for Calvert County (Mitchell, J.), in response to Anderson's first

"Petition for Post Conviction Relief," granted leave for Petitioner to file a belated direct appeal.

A timely belated appeal was filed to the Court of Special Appeals, in which the following issues were raised:

> "1. Were the proceedings occurring in chambers during the trial a material and critical stage of the trial at which the Appellant had an absolute right to be present?
>
> 2. Were the trial judge's statements following the reconvening of Court so prejudicial to the Appellant as to deny him a fair and impartial trial?
>
> 3. Did the trial judge's lecturing alibi witnesses in chambers as to perjury deny to Appellant the right to a fair and impartial trial?"

Anderson's convictions were affirmed by the Court of Special Appeals. Anderson v. State, No. 499, Sept. Term, 1974 (Md. App., filed March 3, 1975). His Petition for Writ of Certiorari to the Court of Appeals of Maryland in which the same allegations were presented was denied. Anderson v. State, Misc. Docket No. 65, Sept. Term, 1975 (Md., filed May 23, 1975).

In his "Post Conviction Procedure Act Petition 2nd, Proceeding", Anderson raised, inter alia, the same issues that were addressed by the Court of Special Appeals. By its

Memorandum and Order of Court of January 31, 1978, the Circuit Court for Calvert County (Levin, J.) adopted the reasoning of the Court of Special Appeals in denying post conviction relief on these grounds but vacated the rape and burglary convictions and sentences on the authority of Newton v. State, 280 Md. 260, 373 A.2d 262 (1977). Anderson's notice of appeal of the denial of post-conviction relief was deemed not timely filed by the Clerk of the Circuit Court for Calvert County. Anderson raised the issue as to the conduct of the trial judge in all these courts but his claims were rejected.

Anderson filed for federal habeas corpus relief on June 14, 1979. The matter was referred to a Magistrate for processing pursuant to Rule 10, Rules Governing Cases Under §2254, and counsel was appointed to represent Anderson. Following a hearing on November 17, 1980, the petition was granted on April 22, 1981 after the District Court adopted, without comment, the Magistrate's Report and Recommendation which had determined that the trial judge acted improperly with respect to two defense witnesses and thereby denied Anderson a fair trial. Those two witnesses,

Phyllis Cook and Clinton Roberts, testified that Anderson was with them playing cards at the time of the murder. Because the trial judge and the prosecutor believed, based on the witnesses' demeanor and the contradictions between their stories, that the witnesses had committed perjury, the witnesses were taken to a chambers conference with the judge, prosecutor and defense attorney. During the conference, the witnesses admitted lying during their testimony. They were recalled to the stand and the trial judge explained to the jury that the witnesses had admitted that their initial testimony was untrue, and that they were being recalled to testify so as to purge themselves of perjury.

The original Fourth Circuit panel, which considered the State's appeal of the District Court's opinion, held, two-to-one, that any error in the trial court's remarks was harmless beyond a reasonable doubt (Apx. 10-11). Anderson petitioned for an en banc rehearing. After reargument, a majority of the Fourth Circuit determined that the trial court's conduct contravened the Sixth Amendment rights both to call witnesses and to effective assistance of counsel, and

the Fourteenth Amendment right to a fair trial. The court concluded that the trial judge's remarks unquestionably influenced the jury's appraisal of the witnesses' credibility and held that the error was not harmless, despite the overwhelming evidence of guilt which was presented. See infra. (Apx. 36).

Four judges of the Fourth Circuit dissented from the majority opinion. In addition to reasoning that no error occurred because Anderson's alibi witnesses admitted committing perjury to the trial judge, the dissenters reviewed the testimony of the witnesses in which they indicated to the jury they lied.

Evidence Presented at Trial

On April 27, 1970, Eleanor Davis, a 62-year-old widow, was found raped and murdered in her apartment n the Eastport section of Annapolis, Maryland. The medical examiner estimated that Mrs. Davis died between 10 p.m. and 2 a.m. on the night of April 26-27, 1970. Mrs. Davis was brutally beaten on the head with a blunt object, sustaining gaping wounds to her scalp, numerous skull fractures and bruising to the brain. The extensive bruising of the victim's

throat indicated that undue force had been applied to her neck. There was a deep cut similar to a knife injury on her left wrist. The major artery on the left wrist was severed causing extensive loss of blood which ultimately resulted in her death. Her head injuries were of such magnitude that they would have caused Mrs. Davis' death but for the blood loss which was so extensive that it caused death first. Spermazoa were found in the victim's vaginal cavity, indicating that sexual intercourse had occurred prior to death. There were also several small bruises of recent origin on Mrs. Davis' legs.

Police officers testified that Anderson, a neighbor of the victim, admitted the rape and other offenses to them, stating that he had entered the victim's apartment through the bathroom window. Anderson said he moved through the apartment looking for money, and went into the bedroom and awakened Mrs. Davis. According to Anderson, a "funny feeling" came over him, whereupon he had the desire to rape Mrs. Davis. After raping her, Anderson went to the kitchen and found a hammer and a butcher knife. He returned to the bedroom and beat Mrs. Davis in the head with the hammer

and then cut her left wrist with the butcher knife because she was still moaning. Anderson's typewritten, signed confession containing this account was introduced into evidence.

The State also introduced physical evidence at the trial which supported the conclusion that Anderson was the rapist-murderer. Expert police testimony established that finger and palm prints of Anderson were found in Mrs. Davis' bathroom on the top part of the bathtub and inside the window ledge above the tub. On the day Mrs. Davis' body was discovered and the police were conducting their investigation, they discovered that this window was unlocked, unlike all of the other windows. The police experts testified that negroid head hairs were found on Mrs. Davis' nightgown and that caucasian pubic hairs, which were microscopically similar to Mrs. Davis', were found on the pants Anderson admitted wearing on April 26, 1970. Seminal fluid stains were found on the sheets and blankets taken from Mrs. Davis' bed. The seminal stains on the sheet contained both A and B factors as did the seminal stains which were found on the pants taken from Anderson. Because Anderson belonged to blood group A and Mrs. Davis belonged to rare blood group B, the State's

expert witness concluded that Anderson could have contributed the A factor found in the seminal secretions while Mrs. Davis could have contributed the B factors found in the secretions. Blood stains were found on the jacket taken from Anderson.

Stephen Johnson, a State's witness, testified that on the night of the murder, April 26, 1970, he met with a group of people, including Anderson, at a corner approximately 50 to 75 feet from Mrs. Davis' home at 1117 East Port Terrace from 9:15 to between 10:15 and 10:30 p.m.

Anderson testified on his own behalf that he had been generally "fooling around" the neighborhood until the early evening of April 26, 1970. He claimed he met a friend and went to one Phyllis Cook's house between 10 and 11 p.m., where he stayed until 3 a.m. Anderson acknowledged having been in the victim's apartment several months before the murder when he helped her unlock the apartment. He admitted signing the confession, which had been typed by the police, but claimed he had not read the paper and did not know what he was signing. He testified that he did not confess and that he did not understand the paper which he

signed. Anderson admitted wearing the pants on which the police found seminal fluid stains and caucasion pubic hairs on the day the murder was committed. Anderson also admitted that on the night of the murder he wore the jacket on which the blood stains were found.

Phyllis Cook and Clinton Roberts testified as defense witnesses. Cook first stated that although she did not know when Anderson arrived because her clock was broken, he played cards at her house in the evening and left at approximately 3 a.m. Roberts testified that Anderson and he left Eastport around 9:30 and stayed at Cook's until 3 a.m. Both Cook and Roberts contradicted Anderson's testimony that another individual, Irving Chowder, had been present at Cook's houe. Further, Roberts contradicted Anderson's testimony about how they got to Cook's house. Roberts testified that he and Anderson hitchhiked to Cook's house while Anderson claimed that he and Roberts drove with Chowder to Cook's house.

After a recess in the proceedings and a chambers conference in which Cook and Roberts told the trial judge that they had been untruthful in their testimony, they were

recalled to the stand. Cook and Roberts admitted they had lied in their first testimony and changed their testimony as to when and how long Anderson stayed at Cook's.

ARGUMENT

THERE IS NO REASONABLE POSSIBILITY THAT THE TRIAL COURT'S REMARKS CONTRIBUTED TO THE VERDICT, GIVEN THE WITNESSES' ADMISSIONS OF THEIR LIES, AND THE OVERWHELMING EVIDENCE OF ANDERSON'S GUILT.

This Court has held that even though constitutional error may occur at trial, a reviewing court is not justified in reversing a conviction if the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). Since Chapman, this Court has refined and developed the standard for harmless error review. For example, in Harrington v. California, 395 U.S. 250 (1969), the overwhelming evidence against the accused was determined to render harmless beyond a reasonable doubt the improper use of inculpatory statements at trial.

In later cases, this Court has emphasized the need to examine the entire record of the trial and, as long as the evidence of guilt is overwhelming and there is no reasonable possibility that the error contributed to the conviction,

reversal is not required. For harmless error analysis, a reviewing court is not to assess the error in terms of whether it would have convicted the accused, but instead should consider whether in the minds of an average jury, the error would have affected the verdict. See Schneble v. Florida, 404 U.S. 427 (1972); Milton v. Wainwright, 407 U.S. 371 (1972); Brown v. United States, 411 U.S. 223 (1973); Holloway v. State of Arkansas, 435 U.S. 475 (1978) (for harmless error review, appellate court must assess the strength of the State's evidence against the defendant's case). The harmless error cases decided by this Court in the past two decades indicate that the appropriate inquiry is to determine whether the jury would have reached the same result had the error not occurred.

Petitioner submits that review by this Court of the decision of the United States Court of Appeals for the Fourth Circuit is clearly desirable because further explication is needed in light of the Fourth Circuit's ruling in this case. Two members of the initial Fourth Circuit Panel, after reviewing the record of the instant case, concluded that any error emanating from the trial court's remarks was harmless

beyond a reasonable doubt:

> "Anderson tried to establish an alibi with two witnesses who from the start were not positive about the exact amount of time they had spent with him. All the later testimony did was to emphasize how vague their memories actually were. Furthermore, even if Cook and Roberts had never changed their stories, Anderson's alibi defense would have been unavailing. As we outlined above, the evidence corroborated his confession in every detail. Only the murderer could have given as exact an account of the crime as Anderson did.
>
> In the past, courts have gone to extraordinary lengths in the name of liberty to free guilty people on technicalities. Under the facts of this case, we refuse to adopt that practice. Roland Anderson was found guilty by a jury of his peers. That conviction is supported by a large body of evidence and cannot be impugned by the trial judge's error." (Slip op. at 7-8) (footnotes omitted).

Yet, the majority of subsequent en banc panel disagreed, despite the apparent clarity of this Court's prior pronouncements on applying the harmless error rule. Either the majority misunderstands the law or is ignoring it because the only logical conclusion is that the trial court's perhaps intemperate remarks were obviously harmless when properly analyzed. Further, the Court of Appeals simply disregarded this Court's ruling in Sumner v. Mata, 449 U.S. 539 (1981). In assessing the State's evidence, the Court of Appeals

discounted Anderson's confession, which had been determined voluntary and admissible by the State courts, and failed to apply the presumption of correctness mandated by 28 U.S.C. §2254.

Not only is the Court of Appeals' decision inconsistent with the decisions of this Court applying harmless error, but the Court of Appeals' opinion fundamentally misinterprets the facts of this case. The Court of Appeals concluded that if Anderson's alibi defense had been believed by the jury, it would have been highly unlikely that Anderson committed the crime. (Apx. 35). However, that conclusion failed to apply this Court's mandates in assessing the various strengths of the prosecution and defense evidence. Even if the alibi defense had been believed, it would not have explained away the State's physical evidence of caucasian pubic hairs, semen stains, and blood stains which were found on Anderson's clothes.

Anderson's defense was that at the time of the crime he was playing cards with his friends Cook and Roberts. This alibi defense leaves wholly unexplained the State's physical evidence. The Court of Appeals emphasizes that the hairs

were not specifically matched. However, the forensic experts testified that the hair found on Anderson's pants was microscopically similar to the victim's hair. Given the fact that Anderson did not claim to have had sexual intercourse or any intimate contact with another person, let alone another caucasian woman, which would have produced pubic hairs, it was improper for the Court of Appeals to conclude that the alibi defense could have exonerated Anderson absent the alleged error.

Further, the majority opinion ignores the contradiction between the testimony of Anderson and his alibi witnesses in concluding that the alibi defense would have exonerated Anderson. That conflict consisted of, inter alia, the testimony of the alibi witnesses as to how, and with whom, Anderson arrived at Cook's house. Finally, the Court of Appeals erred in making inferences that were not supported by the record and in ignoring the trial judge's affidavit filed in the District Court, which stated that the witnesses admitted lying. Not only did Cook and Roberts tell the judge they were lying, but they also told the jury.

To summarize, in view of the witnesses' own admission that their initial testimony was untrue, the overwhelming evidence presented by the State, and the fact that the defense, even if believed, would not have accounted for the State's physical evidence linking Anderson to the crime, it is inconceivable that the trial judge's remarks affected the jury in its ultimate determination of guilt or innocence. As the majority of the initial Fourth Circuit Panel, in reversing the District Court's granting of the writ, reasoned:

> "Item by item, the evidence corroborated the confession as follows:
>
> 1. Confession: He entered the apartment through the bathroom window.
>
> Evidence: His fingerprints and palmprints were found inside the bathroom window ledge and on the bathtub.
>
> 2. Confession: He searched through the apartment for money.
>
> Evidence: Mrs. Davis was an impeccable housekeeper, yet her bureau drawers were found partially open, as if someone had been rummaging through them.
>
> 3. Confession: Mrs. Davis woke up and recognized him.
>
> Evidence: They lived in the same neighborhood.

4. Confession: He knocked her unconscious.

Evidence: The state's pathologist who testified at trial concluded that Mrs. Davis was raped while she was unconscious.

5. Confession: He raped Mrs. Davis.

Evidence: The autopsy report noted the presence of semen in Mrs. Davis' vagina. Pubic hairs which were microscopically similar to Mrs. Davis' were found on the trousers Anderson admitted having worn on the night of the crime. Seminal secretions found on the bedsheets and on Anderson's clothing evidenced the presence of both of their blood groups. The last is a particularly telling point because Mrs. Davis had an uncommon blood type.

6. Confession: He hit Mrs. Davis over the head with the hammer.

Evidence: The pathologist testified that the murderer had smashed Mrs. Davis' head with a blunt instrument causing gaping scalp wounds, numerous skull fractures, and bruising of the brain.

7. Confession: He slashed her left wrist to kill her.

Evidence: Although the pathologist testified that the head injuries alone would have been fatal, the direct cause of Mrs. Davis' death was a deep cut on her left wrist.

> 8. Confession: He found a hammer and a knife, and took them with him when he left.
>
> Evidence: Mrs. Davis' son testified that a hammer was missing from his mother's belongings.
>
> In sum, the factual evidence matched the confession so exactly as to remove all reasonable possibility of coincidence." (footnotes omitted).

Any error on the part of the trial judge in remarking to the jury as to the defense witnesses' testimony, and his action with respect to the witnesses, must be characterized as harmless beyond a reasonable doubt.

CONCLUSION

Because the Court of Appeals decided the constitutional question presented in this case in a way in conflict with the applicable decisions of this Court, the Petition for Writ of Certiorari should, pursuant to Supreme Court Rule 17.1(c), be granted and the judgment of the

Fourth Circuit, affirming the granting of the petition for writ of habeas corpus, should be reversed.

Respectfully submitted,

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Exhibit A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-6626

ROLAND ANDERSON, #115181,

Appellee,

v.

WARDEN, MARYLAND PENITENTIARY,

Appellant.

81-6627

ROLAND ANDERSON, #115181,

Appellant

v.

WARDEN, MARYLAND PENITENTIARY,

Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, Chief District Judge.

Argued: November 5, 1981 Decided: February 9, 1982

Before FIELD, Senior Circuit Judge, HALL and SPROUSE, Circuit Judges.

Bruce C. Bereano for Appellee/Cross-Appellant; Patricia E. McDonald, Assistant Attorney General (Stephen H. Sachs, Attorney General of Maryland on brief) for Appellant/Cross-Appellee.

HALL, Circuit Judge

The State of Maryland appeals from the grant of a writ of habeas corpus issued by the district court setting aside the state court conviction of Roland Anderson because of misconduct on the part of the trial judge. We find that the trial judge committed error and we do not condone what he did. However, the overwhelming evidence supports the conviction, and therefore we find the error harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). Accordingly, we reverse.

Eleanor Davis was a sixty-two year old widow, living alone in Annapolis, Maryland. On the night of April 26, 1970, sometime between the hours of 10:00 p.m. and 2:00 a.m., she was raped and murdered in her bed. Her bloody and battered body was found the next morning by her adult son.

The day after the murder, the police brought Roland Anderson in for questioning. They did not arrest him then, but he agreed to be fingerprinted and he gave the police hair

and saliva samples. He and his parents also consented to allow the police to search their home. During the search of the defendant's bedroom, the officers found a pair of trousers with blood stains and seminal stains on them. When questioned, Anderson admitted having worn those pants on the night of the murder. Also, there were fingerprints and palmprints found inside Mrs. Davis' bathroom window ledge and on her bathtub, which turned out to be the defendant's. By May 8, the police had amassed enough evidence to consider Anderson a prime suspect, and they placed him under arrest.

Anderson signed a written confession after giving a detailed oral account of the crime.[1/] He related the

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[1/]Anderson was fifteen years old at the time of the crime. Before questioning him, a police officer read him his Miranda rights and explained them to him in the presence of his parents. During the explanation, the officer stopped frequently and another officer asked them if they understood what was being said. Once the defendant had been fully advised of his rights, he and his parents signed a waiver of rights form.

After a couple of hours of questioning, he confessed to the crime. The officer then prepared a written confession and Anderson signed it.

At trial, Anderson tried to disavow the written confession, claiming that he had only a seventh grade education and could not read what he was signing. His (Cont.)

following sequence of events: Having entered Mrs. Davis' apartment through the bathroom window,[2/] he worked his way through the apartment looking for money. Mrs. Davis woke up while he was in her bedroom and recognized him. He knocked her unconscious with his fist. Then a "funny feeling" came over him and he raped her. When he remembered that she would be able to identify him, he decided to kill her. He searched around and found a hammer and a butcher knife. Returning to the bedroom, he beat her over the head with a hammer, and then, because she was still moaning, he slashed her left wrist with the knife. He left, taking the knife and the hammer, which he put into a brown paper bag and stuffed into the garbage can behind his house.[3/]

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argument has no merit. The questioning agent testified about the oral statement in which the defendant had related the details of the murder. The signed confession was merely that statement reduced to writing. Anderson was able to tell about the crime even if he could not read many of his words once they were written down.

[2/]Anderson said that he had gone into Mrs. Davis' apartment through the bathroom window about three months earlier to help her get in when she had locked her keys inside. He said that at that time Mrs. Davis had told him that she was so forgetful about her keys that she had to keep her bathroom window unlocked.

[3/]These items were never recovered.

Item by item, the evidence corroborated the confession as follows:

1. Confession: He entered the apartment through the bathroom window.

   Evidence: His fingerprints and palmprints were found inside the bathroom window ledge and on the bathtub.[4/]

2. Confession: He searched through the apartment for money.

   Evidence: Mrs. Davis was an impeccable housekeeper, yet her bureau drawers were found partially open, as if someone had been rummaging through them.

3. Confession: Mrs. Davis woke up and recognized him.

   Evidence: They lived in the same neighborhood.

[4/]In disputing his confession, Anderson asserted that his fingerprints were in Mrs. Davis' bathroom because he had gone in through the bathroom window to help her get into her apartment when she had locked herself out about three months earlier. This explanation is patently incredible. No juror could believe that the defendant's fingerprints would have remained on Mrs. Davis' bathtub for three months.

4. Confession: He knocked her unconscious.

   Evidence: The state's pathologist who testified at trial concluded that Mrs. Davis was raped while she was unconscious.

5. Confession: He raped Mrs. Davis.

   Evidence: The autopsy report noted the presence of semen in Mrs. Davis' vagina. Pubic hairs which were microscopically similar to Mrs. Davis' were found on the trousers Anderson admitted having worn on the night of the crime. Seminal secretions found on the bedsheets and on Anderson's clothing evidenced the presence of both of their blood groups.[5/] The last is a

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[5/] Mrs. Davis belonged to blood group B; Anderson belongs to blood group A. According to expert testimony adduced at trial, evidence of a person's blood type can be found in body secretions such as saliva, semen, vaginal fluids. Thus, the presence of both types in the secretions is easily explained: Anderson's semen could have contributed the type A factor; Mrs. Davis' vaginal discharge could have contributed the type B factor.

particularly telling point because Mrs. Davis had an uncommon blood type.[6/]

6. Confession: He hit Mrs. Davis over the head with the hammer.

   Evidence: The pathologist testified that the murderer had smashed Mrs. Davis' head with a blunt instrument causing gaping scalp wounds, numerous skull fractures, and bruising of the brain.

7. Confession: He slashed her left wrist to kill her.

   Evidence: Although the pathologist testified that the head injuries alone would have been fatal, the direct cause of Mrs. Davis' death was a deep cut on her left wrist.

8. Confession: He found a hammer and a knife, and took them with him when he left.

   Evidence: Mrs. Davis' son testified that a hammer was missing from his mother's belongings.

[6/] An expert at trial testified that only 10% of the population belongs to blood group B.

In sum, the factual evidence matched the confession so exactly as to remove all reasonable possibility of coincidence.

Nevertheless, the defendant asserted that he was nowhere near the scene of the crime, but that he had been at Phyllis Cook's house on the night of the murder. Ms. Cook and Clinton Roberts both confirmed his story. Roberts testified that he and Anderson had left for Cook's house some time after 9:30 p.m. Although Cook did not know what time they had arrived, she said she knew Anderson had been at her house until 3:00 or 3:30 a.m.

After both sides had rested, the state's attorney told the judge that he thought the alibi witnesses had lied. The judge called Cook and Roberts into his chambers and admonished them about the consequences of perjury, whereupon they both agreed to change their stories. The judge then reconvened court and told the jury that the two alibi witnesses had lied in their earlier testimony and wanted

to revise their statements.[7/] As the witnesses took the stand again, the judge cautioned them that they were being given one last chance to tell the truth.[8/] Roberts then admitted

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[7/]The judge said,

> Mr. Foreman, ladies and gentlemen of the jury at the conclusion of this case two of the witnesses who testified have indicated to the Court that they told an untruth in their testimony and desire an opportunity to correct that before you ladies and gentlemen before this case concludes. As a matter of law, the Court must afford a witness an opportunity to purge himself or herself of perjury. For that purpose we are recalling these two witnesses to the stand to give them an opportunity to revise their stories to what they are now saying is the correct testimony.

[8/]To Ms. Cook, in the presence of the jury, the judge said,

> You have indicated to the Court that a portion of the testimony that you previously gave under oath in this case was false. The Court now affords you an opportunity to correct that testimony by telling the truth and to purge yourself of the perjury you have committed. This is the last chance you will be given in this trial to tell the truth.

Before Roberts took the stand again, the judge spoke with him, in front of the jury, as follows:

> Judge Bowen: At the conclusion of the testimony in this case you indicated to the Court that some portions of the testimony you (Cont.)

that he could have been mistaken about the time he left Anderson's neighborhood that evening, and conceded that it could have been as late as 10:30 or 11:00 p.m. Cook, in turn, acknowledged that she could not be sure if Anderson had been at her house for the entire time between 1:00 a.m. and 3:00 a.m.

The jury found Anderson guilty. We find no reason to question the validity of that verdict.

Anderson tried to establish an alibi with two witnesses who from the start were not positive about the exact amount of time they had spent with him. All the later testimony did was to emphasize how vague their memories actually were.[9/] Furthermore, even if Cook and Roberts had never

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had given before this jury were false. You asked the Court for an opportunity to purge yourself of this crime by being afforded an opportunity to tell the truth to the jury. This is your opportunity to tell the truth. It is the last one you are going to get in this trial.

A. Yes sir.

Judge Bowen: You better make good use of it.

9/ Compare e.g., United States v. Bates, 468 F.2d 1252 (5th Cir. 1972). In Bates, a key witness for the prosecution completely changed his testimony after he had been accused of perjury. Unlike that case, the altered testimony here (Cont.)

changed their stories, Anderson's alibi defense would have been unavailing. As we outlined above, the evidence corroborated his confession in every detail. Only the murderer could have given as exact an account of the crime as Anderson did.

In the past, courts have gone to extraordinary lengths in the name of liberty to free guilty people on technicalities. Under the facts of this case, we refuse to adopt that practice. Roland Anderson was found guilty by a jury of his peers. That conviction is supported by a large body of evidence and cannot be impugned by the trial judge's error.

We have considered the other issues Anderson has raised and we find them to be without merit.[10/] Accordingly,

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could better be characterized as a clarification.

[10/] Anderson claims ineffective assistance of counsel. The only arguable instance of ineffective assistance is counsel's failure to object when the judge commented to the jury about the alibi witnesses' testimony. However, since we hold those acts to have been harmless error, counsel's failure to object can not be faulted.

we reverse the decision of the district court and hold that the petition for a writ of habeas corpus is denied.

REVERSED.

SPROUSE, Circuit Judge, dissenting:

I dissent. It is true that strong circumstantial evidence probative of Anderson's guilt was presented to the jury. It is likewise true that the alibi evidence offered initially and during the post-conviction and habeas corpus proceedings, if believed, was probative of Anderson's innocence. Our task, however, is not to weigh the evidence, but to determine if the trial court's error was of constitutional magnitude. The trial court's actions with respect to the alibi testimony were reconstructed by witnesses during Anderson's habeas corpus and post-conviction proceedings; there is nothing in the record to indicate exactly what transpired in the trial judge's chambers since no transcript of those conversations was prepared. The error occurred in the following manner:

Immediately following the testimony of alibi witnesses Cook and Roberts it appears that the state's attorney

approached the bench and the trial judge inquired as to whether he wanted the two witnesses held; the state's attorney replied in the affirmative and the sheriff was directed to take them into custody. Whether the jury was present during this exchange is not clear; the trial transcript does not indicate that it was excused.

Cook and Roberts later testified that following Roberts' cross-examination they were taken from the courtroom and detained elsewhere in the courthouse. Cook testified that the person detaining her, who she believed to be a baliff, accused her of lying and threatened her with a jail sentence. It is uncertain whether the witnesses then asked to be brought before the trial judge in chambers or whether he ordered them to appear there. In any event, the two witnesses next were taken into the judge's chambers and "given quite a lecture" by the trial judge before returning to the courtroom. The trial judge later stated that at the time Cook and Roberts originally testified it was "obvious" to him that they were lying. There is nothing either in the original trial transcript nor in the record of the habeas corpus proceeding indicating the response of these witnesses to the

"lecture".

However, when the Court reconvened, the judge addressed the jury as follows:

> Mr. Foreman, ladies and gentlemen of the jury at the conclusion of this case two of the witnesses who testified have indicated to the Court that they told an untruth in their testimony and desire an opportunity to correct that before you ladies and gentlemen before this case concludes. As a matter of law, the Court must afford a witness an opportunity to purge himself or herself of perjury. For that purpose we are recalling these two witnesses to the stand to give them an opportunity to revise their stories to what they are now saying is the correct testimony.

As Ms. Cook prepared to testify, the trial judge told her, in the presence of the jury:

> You have indicated to the Court that a portion of the testimony that you previously gave under oath in this case was false. The Court now affords you an opportunity to correct that testimony by telling the truth and to purge yourself of the perjury you have committed. This is the last chance you will be given in this trial to tell the truth.

To Roberts, as he commenced his testimony, the trial judge said:

> At the conclusion of the testimony in this case you indicated to the Court that some portions of the testimony you had given before this jury were false. You asked the Court for an opportunity to purge yourself of this crime by

> being afforded an opportunity to tell the truth to the jury. This is your opportunity to tell the truth. It is the last one you are going to get in this trial.

The majority, although expressly disapproving the trial judge's conduct, characterized it as involving a mere technicality amounting to only harmless error. I disagree. Although there is no Maryland statutory provision regarding the freedom of a state trial judge to comment on the evidence, it is well established that the trial judge should endeavor to maintain an impartial attitude, refrain from unnecessary comment and avoid singling out the testimony of any particular witness for comment. Maryland Dairy Corp. v. Brown, 169 Md. 257, 181 A. 468 (1935). Even a federal trial judge, who clearly is empowered to comment on the evidence, must take special care to maintain an appearance of impartiality. Quercia v. United States, 289 U.S. 466 (1935). The purpose of judicial comment is to assist the jury in arriving at a just conclusion; therefore, the judge's comments must be neutral and not be given so as to intimidate the witnesses or otherwise interfere with the ascertainment of truth.

When a trial judge's comments are as emphatic, and as

one-sided as in this trial, not only is there a strong possibility that the witnesses might be intimidated, but also that defense counsel might be stifled and the efforts of the defendant in his own behalf be repressed. The trial court here blatantly interfered with Anderson's sixth amendment right to freely present the testimony of two alibi witnesses and openly pressed them to change their testimony. Additionally, Anderson had a fourteenth amendment right to a fair trial, which minimally means a fair and impartial judge and jury. The trial judge's remarks clearly indicated his disbelief of the witnesses' first testimony and unquestionably influenced the jury's appraisal of their credibility. The jury, having been advised directly that Cook and Roberts had lied and having heard the judge's strong language addressed to the witnesses, could have only come to one conclusion — that the testimony of the witnesses was false and contrived to save Anderson.

The majority opinion concludes that these actions and their effects were harmless error.

An error involving the denial of a federal constitutional right in a state criminal case can be held harmless only if the reviewing court is satisfied beyond a

reasonable doubt that the error did not contribute to the conviction. Chapman v. California, 386 U.S. 18 (1967). To reach that conclusion, it is necessary not only to review the evidence which came before the jury, but also to evaluate the effect which the improper evidence or proceedings had upon the jury's deliberations.

The evidence probative of guilt included Anderson's fingerprints and palmprints which were found inside the victim's bathroom window ledge and on the bathtub beneath the window, but, as the majority pointed out, Anderson claimed he previously had entered the house through the same window for a legitimate purpose.

It also is true that Anderson confessed. However, he was fifteen years old and had only a seventh grade education at the time the crime was committed. The interrogation began at about 11 p.m. and was not completed until nearly 2 a.m. Although Anderson's parents accompanied him to the police station when he was arrested they soon left, and it was after their departure that Anderson abandoned his earlier strong denials. Also, he repudiated the confession prior to trial, maintaining that he did not remember signing it and

that he had been under the influence of drugs at the time of his arrest and interrogation. The officer conducting the interrogation admitted that the confession was essentially in his own words, not Anderson's, and that Anderson had merely agreed with the statements contained therein.

As detailed by the majority opinion, forensic experts testified that negroid head hairs were found on the victim's nightgown and blanket and that a fragment of caucasian pubic hair was found on trousers taken from Anderson's home. On cross-examination, however, the expert admitted that the negroid head hairs were not specifically identifiable as Anderson's; similarly, the pubic hair could not be identified as the victim's. Blood grouping tests on blood and seminal fluid found on Anderson's clothing and the victim's bed covers did not rule him out as the perpetrator of the crime, but neither did they establish him as such.

The alibi testimony from two witnesses was the evidence probative of innocense. The witness Cook testified initially that Anderson arrived at her home early on the evening of the murder and played cards there all night.

The initial testimony of alibi witness Roberts was that

on the day of the murder he played baseball and wrestled with Anderson and some other neighborhood boys. He then went home to clean up and eat dinner; later, he met the group, including Anderson, on a corner near his home. Roberts testified that they all stood around on the corner until 9:00 or 9:30 p.m. Then, he and Anderson hitchhiked out to Ms. Cook's house, where they joined a card game which lasted until about 3:30 a.m.

Unfettered by the trial court's impermissible comment the jury could have considered this collage of circumstantial and alibi evidence and, disbelieving the alibi evidence, could have found Anderson guilty. An attack on such a verdict grounded on insufficiency of the evidence would have failed. The very large clink in the process, however, is that the jury did not have a fair opportunity to evaluate the alibi testimony; in light of the conduct and comments of the presiding judge they could have only disbelieved the evidence which was favorable to Anderson. Additionally, they were left with the unmistakable impression that the judge believed the alibi testimony was contrived for the benefit of Anderson. This, of course, inescapably added greater weight

to the existing circumstantial evidence probative of guilt.

A reviewing court determining harmless error vel non does not merely determine if there was sufficient evidence to convince a jury of guilt beyond a reasonable doubt. The constitutional error is harmless only if the jury would have convicted even in the absence of the error and the reviewing court is able to determine this beyond a reasonable doubt.

I do not believe that a reviewing court in this case can correctly conclude beyond a reasonable doubt that the denial to Anderson of an impartial judge and jury, by the impermissible judicial tainting of the defense alibi evidence, had no effect on the verdict. I agree with the majority that "guilty" people should not be freed on technicalities. It is the tradition of our criminal jurisprudence and constitutional practice, however, that courts go "to extraordinary lengths in the name of liberty to free" the innocent or more correctly, to free those who have not been constitutionally found guilty. The trial judge's conduct in this case, far from representing a mere technical error, demonstrates vividly the reason for our constitutional shields against the abuse of judicial conduct.

Exhibit B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-6626

ROLAND ANDERSON, #115181,

Appellee,

v.

WARDEN, MARYLAND PENITENTIARY,

Appellant.

No. 81-6627

ROLAND ANDERSON, #115181,

Appellant,

v.

WARDEN, MARYLAND PENITENTIARY,

Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, Chief District Judge.

Heard En Banc October 5, 1982 Decided: December 15, 1982

Before WINTER, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURHAGHAN, SPROUSE, ERVIN and CHAPMAN, Circuit Judges, and FIELD, Senior Circuit Judge, sitting en banc.

Bruce C. Bereano for Appellee/Cross-Appellant; Patricia E. McDonald, Assistant Attorney General (Stephen H. Sachs, Attorney General of Maryland on brief) for Appellant/Cross-Appellee.

SPROUSE, Circuit Judge:

Roland Anderson was found guilty of rape, felony murder and burglary by a jury in the State of Maryland and sentenced to life imprisonment by the state court in 1970. The convictions for rape and burglary were later vacated by a state court applying double jeopardy principles barring multiple punishments, but Anderson remains incarcerated on the felony murder conviction. The United States District Court for the District of Maryland in 1981 granted a writ of habeas corpus to Anderson, finding constitutional error committed by the trial judge in the conduct of Anderson's trial, and the State of Maryland appeals. A divided panel of this court reversed the district court and ordered the case remanded for a denial of the writ of habeas corpus. After an en banc hearing, we now affirm the district court.

The circumstances of the crime are discussed in the panel opinion and are here only summarized, since it is not the constitutional insufficiency of the evidence that supports the habeas corpus attack, but the egregious conduct of the trial judge.

The victim was a 62-year-old white widow, who lived in the same neighborhood in Annapolis, Maryland, as Anderson. Anderson, at the time of the crime, was a fifteen-year-old black who had reached the seventh grade.

At trial, the state presented strong circumstantial evidence pointing to Anderson as the perpetrator of the crimes, and also a written confession signed by Anderson. Anderson disputed the conclusiveness of the circumstantial evidence, and disavowed the confession; but an alibi comprised practically his entire defense, and if believed would have made it highly unlikely that Anderson had committed the crime. The alibi was presented by Anderson's testimony, and by the testimony of two of Anderson's friends, Phyllis Cook and Clinton Roberts. The gist of the alibi was that Anderson had been visiting Phyllis Cook's house, approximately 10 miles away from the scene of the murder,

during the time in which the crime occurred.

During cross-examination of Cook and Roberts, the state's attorney asked both witnesses if they were aware of the penalty of perjury. The trial court instructed Roberts in the presence of the jury that the penalty was 10 years' imprisonment, and that Roberts should bear that in mind in answering questions.

Immediately following the testimony of Cook and Roberts, it appears that the state's attorney approached the bench and the trial judge asked whether the state's attorney wanted witness Roberts held; the state's attorney replied in the affirmative and the sheriff was directed to take Roberts into custody. While the record is unclear, it seems likely that the jury was present in the courtroom during this exchange and possibly saw Roberts (and Cook) taken into custody by the sheriff.

Cook and Roberts testified in post-trial proceedings that following Roberts' cross-examination they were taken from the courtroom and detained elsewhere in the courthouse. Cook testified that a person who she believed to be a bailiff detained her in a small room, accused her of

lying, and threatened her with a ten-year jail sentence for perjury. Roberts testified that a policeman took him from the courtroom to a small room with bars, where someone came and talked to him about perjury. The two witnesses were then brought to the judge's chambers and were "given quite a lecture" by the trial judge, who was "upset," concerning the falsity of their testimony. The witnesses then returned to the courtroom and testified a second time. Their response to the "lecture" is not indicated in either the original trial transcript or the record of the habeas corpus proceedings. The defendant was not present in chambers; but the defendant's attorney and the state's attorney were there. The proceedings were not recorded.

Following the conference in chambers, the court reconvened, and the judge addressed the jury as follows:

> Mr. Foreman, ladies and gentlemen of the jury, at the conclusion of this case two of the witnesses who testified have indicated to the Court that they told an untruth in their testimony and desire an opportunity to correct that before you ladies and gentlemen before this case concludes. As a matter of law, the Court must afford a witness an opportunity to purge himself or herself of perjury. For that purpose we are recalling these two witnesses to the stand to give them an opportunity to revise their

stories to what they are now saying is the correct testimony.

As Cook prepared to testify, the trial judge told her, in the presence of the jury:

> You have indicated to the Court that a portion of the testimony that you previously gave under oath in this case was false. The Court now affords you an opportunity to correct that testimony by telling the truth and to purge yourself of the perjury you have committed. This is the last chance you will be given in this trial to tell the truth.

To Roberts, as he commenced his testimony, the trial judge said:

> At the conclusion of the testimony in this case you indicated to the Court that some portions of the testimony you had given before this jury were false. You asked the Court for an opportunity to purge yourself of this crime by being afforded an opportunity to tell the truth to the jury. This is your opportunity to tell the truth. It is the last one you are going to get in this trial. . . . You better make good use of it.

The subsequent testimony of Cook and Roberts varied from their original testimony and considerably weakened the alibi.

The trial court's conduct invaded at least two areas of protection to which Anderson was entitled under the Constitution—his sixth amendment right to call witnesses in

his behalf, and to the effective assistance of counsel; and his fourteenth amendment right to a fair trial.

The judge openly and successfully pressed defendant's two key witnesses to change their testimony. This blatantly interfered with Anderson's sixth amendment right to freely present the testimony of the two alibi witnesses. See Webb v. Texas, 409 U.S. 95 (1972); Washington v. Texas, 388 U.S. 14 (1967). Nor can we ignore the effect of the court's forcefully expressed opinion on defendant's counsel. When a trial judge's comments are as emphatic, and as one-sided as in this trial, not only is there a strong possibility that the witnesses might be intimidated, but also that defense counsel's freedom of action might be stifled. The possibility that the effectiveness of Anderson's assistance of counsel was prejudicially reduced is demonstrated by counsel's failure to object to Anderson's absence while the judge lectured the witnesses in chambers; and by counsel's failure to object and request a mistrial after the judge's improper remarks before the jury.

Anderson had a fourteenth amendment due process right to a fair trial, which minimally means a fair and impartial judge and jury. This right was violated. The trial

judge's remarks clearly indicated his disbelief of the witnesses' first testimony and unquestionably influenced the jury's appraisal of their credibility. The jury, having been advised directly that Cook and Roberts had lied and having heard the judge's strong language addressed to the witnesses, could have only come to one conclusion — that the initial testimony of the witnesses was false and contrived to save Anderson.

Rules governing comments of trial judges during criminal trials do not by themselves determine the due process parameters of fairness. When the fairness of such comments is in issue, however, the doctrine expressed by those rules is illuminating.

Although there is no Maryland statutory provision regarding the freedom of a state trial judge to emment on the evidence, it is well established that the trial judge should endeavor to maintain an impartial attitude, refrain from unnecessary comment and avoid singling out the testimony of any particular witness for comment. Western Maryland Airy Corp. v. Brown, 169 Md. 257, 181 A. 468 (1935). Federal trial judges usually are more freely empowered than state judges

to comment on the evidence, but they also must take special care to maintain an appearance of impartiality. Quercia v. United States, 289 U.S. 446 (1933). The purpose of judicial comment is to assist the jury in arriving at a just conclusion; therefore, the judge's comments must be neutral and not be given so as to intimidate the witnesses or otherwise interfere with the ascertainment of truth.

"It was for the jury to determine which of the witness' stories would be given credence, or indeed whether the witness would be believed at all. The comments by the trial judge clearly infringed upon the jury's credibility determining process and appellant was thereby deprived of a fair trial." United States v. Bates, 468 F.2d 1252, 1255 (5th Cir. 1972). See United States v. Reed, 414 F.2d 435, 442, (Simpson, J., dissenting), rev'd en banc, 421 F.2d 190 (5th Cir. 1969).

Maryland acknowledges in its brief that the trial judge's remarks were erroneous, and in argument conceded that the error was of constitutional dimension. The only issue therefore is whether the error was harmless. An error involving the denial of a federal constitutional right in a state criminal case can be held harmless only if the reviewing court

is satisfied beyond a reasonable doubt that the error did not contribute to the conviction. Chapman v. California, 386 U.S. 18 (1967).

Harm is presumed to have come from the constitutional error, and the state has the "heavy burden" of proving harmlessness beyond a reasonable doubt. Eberhardt v. Bordenkircher, 605 F.2d 275, 280 (6th Cir. 1979). See Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968). The Chapman test is a "strict" one, United States v. Jones, 542 F.2d 186, 213 (4th Cir. 1976). Harmless error analysis essentially involves the question of whether the error is but a "small error[] or defect that [has] little, if any, likelihood of having affected the result of the trial." Eberhart v. Bordenkircher, 605 F.2d 275, 279 (6th Cir. 1979), quoting Chapman, 386 U.S. at 22. Both Chapman and a succeeding harmless error case, Harrington v. California, 395 U.S. 250 (1969), warn against "giving too much emphasis to 'overwhelming evidence' of guilt," where constitutional error affects substantial rights. Allison v. Gray, 603 F.2d 633, 635 (7th Cir. 1979).

In gauging, then, the harmlessness vel non of the trial judge's conduct and comments in this case, we look to its

reasonably possible effect on the outcome. We must look at the evidence, and the reasonably possible effects of the error on the jury's consideration of that evidence.

In the case sub judice, the evidence probative of guilt included Anderson's fingerprints and palmprints which were found inside the victim's bathroom window ledge and on the bathtub beneath the window. However, Anderson claimed he had previously entered the house through the same window for a legitimate purpose.

It also is true that Anderson confessed. However, he was fifteen years old and had only a seventh grade education at the time the crime was committed. His interrogation began at about 11:00 P.M. and was not completed until nearly 2:00 A.M. Although Anderson's parents accompanied him to the police station when he was arrested, they soon left, and it was after their departure that Anderson abandoned his earlier strong denials. Anderson repudiated the confession prior to trial, maintaining that he did not remember signing it and that he had been under the influence of drugs at the time of his arrest and interrogation. The officer conducting the interrogation admitted that the confession was essentially in

his own words, not Anderson's, and that Anderson had merely agreed with the statements contained therein. The congruence betwcen the text of the confession and the physical facts is undeniable. However, also undeniable is the interrogating officer's clear admission that the method of interrogation was for the officer to repeatedly describe the homicide in detail, as the physical facts painted it, and then repeatedly ask the defendant if that wasn't how he did it. The trial court in an admissibility hearing on the confession acknowledged that this putting words in the defendant's mouth possibly detracted from the weight of the confession, but did not render it inadmissible. The weight of the congruence of confession and physical facts is thus substantially diminished.

Forensic experts testified that negroid hairs were found on the victim's nightgown and blanket and that a fragment of caucasian pubic hair was found on trousers taken from Anderson's home. On cross-examination, however, the expert admitted that the negroid head hairs were not specifically identifiable as Anderson's; similarly, the pubic hair could not be identified as the victim's. Blood grouping

tests on blood and seminal fluid found on Anderson's clothing and the victim's bed covers did not rule him out as the perpetrator of the crime, but neither did they establish him as such.

The alibi testimony from Anderson and his two witnesses was the evidence probative of innocence. The state established that the crime was committed between 10:00 P.M. and 2:00 A.M. Anderson testified to leaving his neighborhood and going to Phyllis Cook's house at about 10:00 P.M. where he visited, played cards and talked until about 3:00 A.M. Phyllis Cook testified initially that Anderson came to her home on the evening of the murder and played cards and talked until approximately 3:00 A.M.

The initial testimony of alibi witness Roberts was that on the day of the murder he played baseball and wrestled with Anderson and some other neighborhood boys. Roberts then went home to clean up and eat dinner; later, he met the group, including Anderson, on a corner near his home. Roberts testified that they all stood around on the corner until 9:00 or 9:30 P.M. Then he and Anderson hitchhiked out

to Cook's house, where they ate, played cards and talked until about 3:30 A.M.

After her detention and lecture by the judge, Cook testified that Anderson had not arrived at her house until about 11:45 P.M., and she was unable to say that Anderson was constantly present until 3:00 A.M. Roberts on retaking the stand placed the time of arrival at Cook's at 10:30 or 11:00 P.M., and Roberts stated that he left, without Anderson, at about 1:00 A.M.

At the post-conviction proceedings, Cook testified that she was terrified, and "reworded [her testimony] to satisfy. . .the court and judge . . . so they wouldn't lock me up." She related difficult personal circumstances making her especially vulnerable to threats of imprisonment. Roberts, also worried about imprisonment, said he "was just scared . . . I just would say anything."

It cannot be argued that there was not strong evidence probative of Anderson's guilt — there was. The trial judge so dominated the jury's impressions, however, that it is impossible to gauge if the jury could have observed the fourteenth amendment's command to afford the defendant

"due process" while weighing the evidence before them.

The influence of the trial judge on the jury "is necessarily and properly of great weight" and "his lightest word or intimation is received with deference, and may prove controlling." Quercia v. United States, 289 U.S. 466, 470 (1933), quoted in United States v. Cisneros, 491 F.2d 1068, 1074 (5th Cir. 1974) (reversing conviction where trial court said "somebody is lying in this case" and indicated who that person was). The judge in the case sub judice, by having the witnesses held for perjury and admonishing them in front of the jury, told the jury that the witnesses were lying in their initial testimony and being truthful in their subsequent testimony.

Unfettered by the trial court's impermissible comments, the jury in the instant case could have considered both the strong evidence of guilt and the alibi evidence and, disbelieving the alibi evidence, could have found Anderson guilty. An attack on such a verdict, grounded on the insufficiency of the evidence, would have failed. Likewise, it is in the realm of possibility that the jury disregarded the judge's comments. There is no way, however, short of

surmise to reach the latter conclusion. In light of the conduct and comments of the presiding trial judge the opposite is probably true — that the jury was given a strong incentive to wholly discount the evidence favorable to Anderson. Moreover, the improper judicial comment on the defendant's evidence inescapably tended to spill over and to add greater weight to the circumstantial evidence probative of guilt. Cf. Miller v. North Carolina, 583 F.2d 701, 708 (4th Cir. 1978).

We cannot conclude beyond a reasonable doubt that the denial to Anderson of an impartial judge and jury, by the impermissible judicial tainting of the defense alibi evidence, had no effect on the verdict.[1] The trial court's egregious conduct in this case was not harmless. It was in no way a

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[1] "[A]lso inimical to the judicial process . . . [are errors] of encroachment by the judge on the province of the jury, or vice versa. . . . When judicial comment has exceeded fair guidance and attempted to lead the jury to a particular verdict, the comment carries a high risk that it influenced the jury. Even a cautionary instruction . . . may not counteract the force of comment attended by the authority of the judge's office. An appellate court might still find it difficult to believe it highly probable that the comment did not influence the verdict." R. Traynor, The Riddle of Harmless Error 71-72, (1970).

mere technical error. Anderson did not receive the fair trial he was constitutionally entitled to.

The judgment of the district court is affirmed.

AFFIRMED.

HALL, Circuit Judge, dissenting:

In writing the majority panel opinion in this case, I stated that the trial judge committed harmless error in the manner in which he handled the perjured testimony of the defendant's alibi witnesses. After hearing the en banc argument of counsel and further consultation with my brother judges, I now conclude that I was wrong. The trial judge did not commit any error at all. Under the circumstances, he acted judiciously and properly. Not to have permitted a recall of the offending witnesses after hearing the truth would have been improper conduct on his part. In all other respects, I stand by my published opinion and adopt it as a dissent to the en banc opinion of this Court.

As a further comment on the majority opinion, in my view a majority of this Court has gone beyond the bounds of reason to find a way to reverse the conviction of a

murderer. Anyone reading the record in this case cannot reasonably reach any other conclusion but that this defendant is guilty. Setting aside his conviction is an affront to society.

Judge Russell joins in this dissent.

Judge Field joins in this dissent.

WIDENER, Circuit Judge, dissenting:

I join in Judge Hall's dissent, and I would add a word.

The majority correctly notes that the jury could have only come to one conclusion, that the initial testimony of the witnesses was false and contrived to save Anderson. But that was the fault of the witnesses, not of the trial judge. Both the witnesses changed crucial parts of their testimony with respect to Anderson's alibi; the changed testimony concerned times when Anderson was actually with them on the night of the murder.

That they were confessed perjurers is shown beyond any doubt by the following question and answer from the witness Phyllis Cook:

> "Q. All right. Now, I want you to tell the jury what we discussed in chambers and where if any error you might have made in the testimony that

you gave regarding the time of the arrival of this Defendant, who he arrived with and what time he left. Go slowly, but tell the truth.

"A. Just the part where I lied at." (Italics added.)

I think the jury was entitled to hear the changed testimony, and not only was the jury entitled to hear it, the trial court had every right to comment on it, and indeed an obligation to see that its proceeding was not corrupted by admittedly perjured testimony.

Even in the face of the extreme provocation recounted in the various opinions, the trial judge in his instructions to the jury bent over backward to instruct them that his opinion did not govern which testimony they should have believed:

"Anything the Court says about a given witness or a given line of testimony is not meant to say that we think that line ought to be preferred over something that tends to contradict it. That is your job. What we are trying to do is point out to you the real decision that is before you in these facts."

* * * *

"Now you must consider all of the evidence bearing on whether or not this accused was the person who committed these acts. You are free and you are to consider all the evidence which tends to show that he was not. You are free to believe or disbelieve all or any part of any witnesses' testimony."

I doubt that the remarks of the trial judge now complained of exceeded permissible bounds under rules of state procedure upon the discovery of admittedly perjured, very crucial testimony, much less were outside constitutional limitations as the majority now holds.